

## Identify the Legal Implications of the Homosexual Conduct Policy

181-301-0001

Conditions: Given information on the Army's guidance regarding the DoD homosexual conduct policy.

Standards: Define what constitutes homosexual conduct. Further, identify the responsibilities of a commander when inquiring into an allegation of homosexual conduct, including the rights of the soldier under inquiry. Finally, identify the rights of a soldier who is being harassed or threatened based on a perceived sexual orientation. Included in this last standard is the ability to identify the commander's responsibilities toward a harassed or threatened soldier, as well as the commander's duty to properly investigate the soldier(s) who are alleged to have committed the harassment and/or threat.

### Training and Evaluation Guide

#### Performance Steps:

- . Identify Legal Implications of the Homosexual Policy.
  - a. Discuss the key elements of the homosexual policy.
  - b. Discuss proper procedures for investigating homosexual conduct.
  - c. Discuss guidance addressing soldiers being harassed or threatened because of a perceived sexual orientation.

### Performance Evaluation Guide

Evaluation Preparation: All performance measures must be completed IAW the UCMJ, MCM, and any other applicable regulations.

Brief Soldier: Tell the soldier that he or she is required follow the steps needed to motivate a soldier to perform to standards. Tell the soldier that he or she will be required to correctly discuss and/or perform at least 75 percent of the steps needed to motivate a soldier to receive a GO.

Performance Measures	Results
Identified the legal implications of the homosexual policy.	GO / NO-GO
a. Identified the key elements of the homosexual policy.	GO / NO-GO
b. Identified the proper procedures for investigating homosexual conduct	GO / NO-GO
c. Identified the specific guidance addressing soldiers being harassed or threatened because of a perceived sexual orientation.	GO / NO-GO

Evaluation Guidance: Score the soldier GO if 75 percent or more of the performance measures are passed and NO-GO if less than 75 percent of the measures are passed. If the soldier scores NO-GO on a performance measure, show the soldier what was done wrong and how to do it correctly.

#### Required References:

Misc Pub 27-7 (MCM which contains UCMJ).  
AR 27-10  
AR 600-20

## TRAINING SUPPORT PACKAGE (TSP)

(Revised 15 Sep 2000)

<b>TSP Number/ Title</b>	181-A-0001 Identify the Legal Implications of the Homosexual Conduct Policy
<b>Task Number(s)/ Title(s)</b>	181-301-0001 Identify the Legal Implications of the Homosexual Conduct Policy
<b>Effective Date</b>	15 September 2000
<b>Supersedes TSP(s)</b>	None.
<b>TSP Users</b>	Use this TSP for awareness training at the following courses: Precommissioning, OBC, CCC, WOCS, WOBC, WOAC, PLDC, BNCOC and ANCOC.
<b>Proponent</b>	The proponent for this document is Judge Advocate General's School of the Army.
<b>Comments / Recommendations</b>	Send comments and recommendations directly to:  The Judge Advocate General's School ATTN: JAGS-ODE 600 Massie Road Charlottesville, VA 22903-1781  Or e-mail: <a href="mailto:jag.enlistedtraining@hqda.army.mil">jag.enlistedtraining@hqda.army.mil</a>
<b>Foreign Disclosure Restrictions</b>	This product has been reviewed by the product developers in coordination with The Judge Advocate General's School foreign disclosure authority. This product is releasable to military students from all requesting foreign countries without restrictions.

### PREFACE

**Purpose** This Training Support Package provides the instructor with a standardized lesson plan for presenting instruction for:

<b>Task Number:</b> 181-301-0001
<b>Title:</b> Identify the Legal Implications of the Homosexual Conduct Policy
<b>Conditions:</b> Given information on the Army's guidance regarding the DoD homosexual conduct policy.
<b>Standards:</b> Define what constitutes homosexual conduct. Further, identify the responsibilities of a commander when inquiring into an allegation of homosexual conduct, including the rights of the soldier under inquiry. Finally, identify the rights of a soldier who is being harassed or threatened based on a perceived sexual orientation. Included in this last standard is the ability to identify the commander's responsibilities toward a harassed or threatened soldier, as well as the commander's duty to properly investigate the soldier(s) who are alleged to have committed the harassment and/or threat.

This TSP  
Contains

**TABLE OF CONTENTS**

	<u>PAGE</u>
Preface .....	1
Lesson Section I Administrative Data .....	2
Section II Introduction .....	4
Terminal Learning Objective - Identify the legal implications of the homosexual conduct policy .....	4
Section III Presentation .....	5
Section IV Summary .....	10
Section V Student Evaluation .....	11
Appendix A Viewgraph Masters .....	A-1
Appendix B Test(s) and Test Solution(s).....	B-1
Appendix C Practical Exercises and Solutions (N/A).....	N/A
Appendix D Student Handouts .....	D-1

**181-301-0001 version 1 / Identify the Legal Implications of the Homosexual Conduct Policy**

**SECTION I. ADMINISTRATIVE DATA**

<b>All Courses Including This Lesson</b>	<u>Course Number</u>	<u>Course Title</u>
	ANCOC	Advanced Noncommissioned Officer Course
	BNCOC	Basic Noncommissioned Officer Course
	CCC	Captains Career Course
	CGSOC	Command and General Staff Officer Course
	FSC	First Sergeants Course
	OBC	Officer Basic Course
	PLDC	Primary Leadership Development Course
	PRECOMMISSIONING	Precommissioning
	SMC	Sergeants Major Course
	WOAC	Warrant Officer Advanced Course
	WOBC	Warrant Officer Basic Course
	WOCS	Warrant Officer Candidate School
	WOSC	Warrant Officer Staff Course
	WOSSC	Warrant Officer Senior Staff Course

  

<b>Task(s) Taught(*) or Supported</b>	<u>Task Number</u>	<u>Task Title</u>
		<u>Individual</u>
	181-301-0001 (*)	Identify the Legal Implications of the Homosexual Conduct Policy

**Reinforced Task(s)**

<u>Task Number</u>	<u>Task Title</u>
--------------------	-------------------

**Academic Hours**

The academic hours required to teach this TSP are as follows:

	<u>Resident Hours/Methods</u>
	.5 / Study Assignment
Test	.3
Test Review	.2
Total Hours:	1.0

**Prerequisite Lesson(s)**

<u>Lesson Number</u>	<u>Lesson Title</u>
None	

**Clearance Access**

Security Level: Unclassified  
 Requirements: There are no clearance or access requirements for the lesson.

**References**

<u>Number</u>	<u>Title</u>	<u>Date</u>	<u>Additional Information</u>
AR 27-10	Military Justice	20 Aug 1999	
AR 600-20	Army Command Policy	15 Jul 1999	
DA FORM 3881	Rights Warning Procedure/Waiver Certificate	01 Nov 1989	
MCM	Manual for Courts-Martial, United States, 1998 Edition	01 Jan 1998	

**Student Study Assignments**

None.

**Instructor Requirements**

None.

**Additional Support Personnel Requirements**

None

**Equipment Required for Instruction**

<u>Name</u>	<u>Quantity</u>	<u>Expendable</u>
PROJECTOR,OVERHEAD	1	No

**Materials Required**

**Instructor Materials:**  
 TSP 181-A-0001.

**Student Materials:**  
 Student Handout to Accompany TSP 181-A-0001 (Homosexual Conduct Policy), located at Appendix D, when TSP is given as Awareness Training.

**Classroom,  
Training Area,  
and Range  
Requirements**

Classroom, Gen Purpose, 750SF, 30 PN

**Ammunition  
Requirements**

<u>Name</u>	<u>Student Qty</u>	<u>Misc Qty</u>
None		

**Instructional  
Guidance**

**NOTE:** Before presenting this lesson, instructors must thoroughly prepare by studying this lesson and identified reference material.

None.

**Proponent  
Lesson Plan  
Approvals**

<u>Name</u>	<u>Rank</u>	<u>Position</u>	<u>Date</u>
Calvin M. Lederer	COL	Commandant	14 Sep 2000
Sarah P. Merck	COL	Deputy Commandant	14 Sep 2000
Kenneth T. Grant	LTC	Dir, NRI & ETD	14 Sep 2000
George A. Figurski	MAJ	Dep Dir, NRI & ETD	14 Sep 2000

**SECTION II. INTRODUCTION**

Method of Instruction: <u>Study Assignment</u>
Instructor to Student Ratio is: <u>1:1</u>
Time of Instruction: <u>5 mins</u>
Media: <u>Individualized, self-paced Instruction</u>

**Motivator**

This lesson will acquaint you with, or inform you of, the DoD policy on homosexual conduct. Specifically, you will learn about the policy's provisions regarding what constitutes homosexual conduct. Further, you will also learn about your rights, the rights of your soldiers, as well as the command's responsibilities, during the conduct of an inquiry into allegations of homosexual conduct. You will be provided guidance of which you, your soldiers, and the command should be aware should any soldier feel harassed or threatened because of a perceived sexual orientation. Finally, this guidance will include suggested ways to investigate soldiers who harass others while protecting the harassed soldier's privacy interest in their own sexual orientation.

**Terminal  
Learning  
Objective**

**NOTE:** Inform the students of the following Terminal Learning Objective requirements.

At the completion of this lesson, you [the student] will:

<b>Action:</b>	Identify the legal implications of the homosexual conduct policy
----------------	--

<b>Conditions:</b>	Given information on the Army's guidance regarding the DoD policy on homosexual conduct.
<b>Standards:</b>	Define what constitutes homosexual conduct. Further, identify the responsibilities of a commander when inquiring into an allegation of homosexual conduct, including the rights of the soldier under inquiry. Finally, identify the rights of a soldier who is being harassed or threatened based on a perceived sexual orientation. Included in this last standard is the ability to identify the commander's responsibilities toward a harassed or threatened soldier, as well as the commander's duty to properly investigate the soldier(s) who are alleged to have committed the harassment and/or threat.

**Safety Requirements**

None.

**Risk Assessment Level**

Low - Low.

**Environmental Considerations**

None.

**Evaluation**

A performance test for this lesson, including answer key, is located at Appendix B.

**Instructional Lead-In**

For soldiers who have been in the Army since 1994, it is important to realize that the DoD policy on homosexual conduct has not changed since then. Under this policy, soldiers still have certain rights, and commanders still have certain responsibilities when investigating allegations of homosexual conduct. Based on recent Army guidance, this lesson plan also focuses on the rights of soldiers, and the responsibilities of the command, when faced with a soldier being harassed or threatened because of a perceived sexual orientation.

### SECTION III. PRESENTATION

1. Learning Step / Activity 1. List the key elements of the homosexual conduct policy.

Method of Instruction: Study Assignment

Instructor to Student Ratio: 1:1

Time of Instruction: 5 mins

Media: Individualized, self-paced Instruction

**NOTE:** Show Slide 1, DoD Homosexual Policy.

a. Conduct. The key to understanding the DoD policy on homosexual conduct is to remember that it focuses on homosexual conduct (what a soldier does or says) not on sexual orientation alone (how a soldier feels about himself or herself as a heterosexual ("straight") or homosexual ("gay" or "lesbian") or bisexual (sexually attracted to both genders)).

b. "SAM". The easiest way to remember the key features of the DoD policy on homosexual conduct is to remember the acronym "SAM." "SAM" stands for Statements – Acts – Marriages.

(1) Statements. The command will take action to separate a soldier who says he or she is gay, or a lesbian, or has a homosexual orientation, because the law says it is reasonable to presume that someone who says he or she has such an orientation will act on that orientation. There is, however, a special rule about statements that we'll discuss later.

(2) Acts. The command will take action to separate a soldier who performs a homosexual act.

(a) A homosexual act is any bodily contact, actively taken or passively permitted, between members of the same sex, for the purpose of satisfying sexual desire. It does not require any particular form of intercourse or penetration.

(b) A homosexual act also includes any bodily contact that a reasonable person would understand to demonstrate a likelihood that the person will engage in homosexual acts. Depending on the circumstances, this could include hand-holding, kissing, or "slow" dancing with a member of the same sex.

(3) Marriages. The command will take action to separate a soldier who marries or attempts to marry a person of the same biological gender (a male soldier who marries or tries to marry another man, or a female soldier who marries or tries to marry another woman).

(4) Special Rule About Statements. As previously stated, a soldier who says that he or she is homosexual (e.g., "I'm gay," or "I'm a lesbian," or "I have a homosexual orientation," or similar such language) will be processed for separation. Why? .... Because it is reasonable to presume that someone who says that he or she has such an orientation will act on the orientation and engage in a homosexual act. However, such a soldier may attempt to convince an administrative separation that despite having made a statement that he or she is homosexual, the soldier will not engage in homosexual acts. If the soldier can convince the separation board that he or she will not engage in homosexual acts, the board can choose to recommend the soldier be retained in the Army.

**NOTE:** Show Slide 2, DoD Homosexual Conduct Policy.

c. It is your duty, as well as your legal obligation, to follow the Army's rules and policies. You demonstrate your loyalty to the Army and your fellow soldiers by behaving in accordance with Army policies. You also serve honorably when you adhere to the Army's regulations, policies, and laws.

d. If you, as a soldier, take any of the following actions, you have violated the homosexual conduct policy and may be discharged:

(1) Make a homosexual statement (for example, "I am gay," "I am a lesbian," "I am homosexual," or "I have a homosexual orientation").

(2) Engage in a homosexual act.

(3) Enter, or attempt to enter, into a homosexual marriage.

e. A special point: Saying that you are a homosexual or committing other homosexual conduct so you can avoid a military obligation not only violates Army policy, it betrays your military duty. If you make such a statement or commit such conduct to avoid a military obligation (such as a deployment), you may also be subject to disciplinary action under the UCMJ.

**NOTE:** Conduct a check on learning and summarize the learning activity.

2. Learning Step / Activity 2. Homosexual conduct inquiries.

Method of Instruction: Study Assignment  
Instructor to Student Ratio: 1:1  
Time of Instruction: 5 mins  
Media: Individualized, self-paced Instruction

**NOTE:** Show Slide 3, Investigating Homosexual Conduct.

Before discussing the topic of investigating homosexual conduct, you first need to have a clear understanding of the DoD policy on homosexual conduct. Remember that the policy is conduct-based: it focuses on what a soldier does or says, not on the soldier's orientation alone.

a. Only commanders can initiate fact-finding inquiries into homosexual conduct. You may not, on your own, do any investigation or inquiry into whether a soldier is homosexual or has committed homosexual conduct. Subordinate leaders should direct questions and report grounds for separation to their commanders. A soldier's duty to do the right thing extends to observed incidents of harassment. Soldiers and subordinate leaders should remain sensitive to instances of harassment based on perceived sexual orientation. They must report such incidents to the chain of command.

b. Commanders investigate homosexual conduct only if there is credible evidence of a homosexual statement, act, or marriage (remember "SAM"). What is credible evidence? Credible evidence is any information, considering its source and the surrounding circumstances, which supports a reasonable belief that there is a basis for discharge.

c. Commanders are not supposed to investigate (or take other action) when there is NO credible evidence of a basis for discharge. Examples of NO credible evidence include:

(1) Mere suspicion of homosexual conduct, without any credible evidence.

(2) Other people's opinions or rumors about a soldier's homosexual orientation, when the opinion or rumor is not based on factual evidence of a basis for discharge.

(3) The fact that a soldier reads a homosexual publication or goes to a homosexual bar.

(4) Statements made by a soldier claiming homosexuality when the evidence available at the time of the statement supports an attempt to avoid duty, or to void an enlistment. Commanders should exercise care before determining that such statements do not meet the requirements of "SAM" as outlined in the DoD Homosexual Conduct Policy guidelines.

d. Informal inquiries are preferred. CID or MPI usually should not become involved in an investigation to determine whether homosexual conduct took place.

e. When interviewing a soldier believed to have committed homosexual conduct, explain the homosexual conduct policy to the soldier before questioning. The interviewer will begin the interview by informing the soldier of his or her rights against self-incrimination under Article 31, UCMJ. If the soldier does not want to make a statement, the interviewer will not ask further questions.

(1) An interviewer shall not ask, and a soldier shall not be required to reveal, whether a soldier is heterosexual, homosexual, or bisexual. For example, you cannot ask either, "Are you homosexual?" or "Are you gay?"

(2) If the inquiry is only about a statement (e.g., "I am gay") the soldier has made, in most cases, the admission by the soldier is sufficient and no further investigation is required. If a commander wishes to inquire further to determine whether the statement is credible, the commander may do the following:

(a) If the soldier is to be interviewed about the statement, he or she must first be read his or her rights against self-incrimination under Article 31, UCMJ.

(b) The soldier can then be asked if he or she has committed, or attempted to commit, homosexual acts. The soldier may be asked if he or she intends to commit homosexual acts in the future. The soldier may be asked why he or she made the statement and what the statement meant.

(c) Members of the soldier's supervisory chain-of-command may be questioned. Other persons suggested by the soldier in the interview may also be questioned.

**NOTE:** Show Slide 4, Investigating Homosexual Conduct.

(d) Any inquiry beyond that stated in paragraphs (a), (b) and (c) above is considered a "substantial investigation" requiring approval from DA level.

i. Statements made by a soldier to certain individuals (e.g., chaplains, attorneys and spouses) may be considered confidential. However, such statements must be looked at separately on a "case by case" basis to determine whether or not the statements are confidential.

j. It is your duty, as well as your legal obligation, to follow the Army's rules and policies. You demonstrate your loyalty to the Army and your fellow soldiers by behaving in accordance with Army policies. You also serve honorably when you adhere to the Army's regulations, policies, and laws.

k. If you, as a soldier, take any of the following actions, you have violated the homosexual conduct policy:

(1) Investigate a soldier for homosexual conduct without a commander's permission.

(2) Accuse a soldier of violating the homosexual conduct policy based on:

- Suspicion without credible evidence;
- Rumors;

- Observing a soldier with homosexual materials or in certain locations (e.g., gay bars).

**NOTE:** Conduct a check on learning and summarize the learning activity.

3. Learning Step / Activity 3. State guidance if a soldier believes he or she is being harassed or threatened because of a perceived sexual orientation.

Method of Instruction: Study Assignment  
Instructor to Student Ratio: 1:1  
Time of Instruction: 5 mins  
Media: Individualized, self-paced Instruction

**NOTE:** Show Slide 5, Anti-Harassment Policy.

A soldier who is being threatened or harassed because he or she is perceived to be homosexual should always seek out his or her chain-of-command to get help. Alternatively, the soldier should go to the chaplain, IG, or a JAG legal assistance attorney.

a. Harassed soldiers are not investigated. If a soldier is being harassed or threatened because the soldier is said or perceived to be homosexual, the harassment or threat is not enough by itself to justify investigating the harassed/threatened soldier for homosexual conduct. This bar to investigation concerning the harassed soldier's sexual orientation does not prevent investigation of the soldier(s) committing the harassment for possible violations of the UCMJ.

**NOTE:** Show Slide 6, Anti-Harassment Policy.

b. There must be credible information apart from harassment. A commander still needs credible information apart from any threat or harassment to justify an inquiry into homosexual conduct.

c. When investigating harassment, a harassed soldier's orientation/conduct should not be investigated. When investigating a threat or harassment, the threatened/harassed soldier's sexual orientation should not be investigated, nor whether he or she committed homosexual conduct. The focus should be on the harassment or threat itself.

d. If credible information comes up during the investigation, it must be carefully reviewed. The information must be credible, apart from the harassment or threat. Receiving this information does not stop the requirement to investigate and take appropriate action against any harasser.

**NOTE:** Show Slide 7, Anti-Harassment Policy.

e. Soldiers being harassed/threatened should seek out their chain-of-command. Soldiers who are being harassed or threatened because they are perceived to be homosexual should seek their chain-of-command for assistance. They should understand that reporting harassment or threats does not support an investigation into whether they have committed homosexual conduct. The command cannot make harassment stop if it is not reported. Commanders must adequately address reported instances of harassment, to include initiating a commander's inquiry under R.C.M. 303, or referring the case to MPI or CID for investigation of the individuals committing

the harassment. Soldiers who are being harassed must know that they will not be investigated regarding their sexual orientation as a result of telling the chain-of-command about the harassment.

**NOTE:** Conduct a check on learning and summarize the learning activity.

4. Learning Step / Activity 4. Administer test.

Method of Instruction: Test  
Instructor to Student Ratio: 1:1  
Time of Instruction: 15 mins  
Media: -None-

**NOTE:** Conduct a check on learning and summarize the learning activity.

5. Learning Step / Activity 5. Conduct test review.

Method of Instruction: Test Review  
Instructor to Student Ratio: 1:1  
Time of Instruction: 10 mins  
Media: Group-paced Instruction

**NOTE:** Conduct a check on learning and summarize the learning activity.

#### SECTION IV. SUMMARY

Method of Instruction: <u>Study Assignment</u>
Instructor to Student Ratio is: <u>1:1</u>
Time of Instruction: <u>5 mins</u>
Media: <u>Individualized, self-paced Instruction</u>

#### Review / Summarize Lesson

a. During this lesson, you learned that the DoD and Army policy on homosexual conduct focused on homosexual conduct and not on sexual orientation. You were advised that the policy covered homosexual conduct, which includes statements, act, and marriages, and that soldiers could be separated from the Army for such conduct. However, you should remember that there is a special rule about homosexual statements. This means that even if a soldier makes a statement that he or she is homosexual, the soldier may still be retained in the U.S. Army if the soldier can convince a separation board that he or she will not actually engage in homosexual acts.

b. The lesson also advised you that only commanders can initiate fact-finding inquiries into homosexual conduct. CID or MPI investigators usually should not become involved in an investigation to determine whether homosexual conduct took place. Commanders may inquire into possible homosexual conduct only if there is credible evidence, meaning more than mere suspicion or rumor, of a homosexual statement, act, or marriage. A commander must explain the homosexual conduct policy to any soldier alleged to have been involved in homosexual conduct before inquiring further. The interviewer, before asking any questions, must first inform the soldier of his or her rights against self-incrimination under Article 31, UCMJ. A "substantial investigation" requires approval from Department of the Army level (see Learning Step/Activity 2, Paragraph g).

---

c. Finally, the lesson advised soldiers, who feel threatened or harassed because of perceived homosexual orientation, to seek assistance from their chain-of-command, chaplain, IG, or JAG legal assistance attorney. When investigating a threat or harassment, the focus should be on the threat or harassment and not on the perceived sexual orientation or alleged homosexual conduct of the threatened/harassed soldier. If the commander has credible information regarding any homosexual conduct apart from the threat or harassment, the commander could then initiate an inquiry into these allegations.

---

**Check on Learning**

Determine if the students have learned the material presented by soliciting student questions and explanations. Ask the students questions and correct misunderstandings.

---

**SECTION V. STUDENT EVALUATION**

---

**NOTE:** Describe how the student must demonstrate accomplishment of the TLO standard. Refer student to the Student Evaluation Plan.

**Testing Requirements**

A performance test for this lesson, including answer key, is located at Appendix B.

---

**NOTE:** Rapid, immediate feedback is essential to effective learning. Schedule and provide feedback on the evaluation and any information to help answer students' questions about the test. Provide remedial training as needed.

**Feedback Requirements**

The answer key includes an explanation for the solution to each test question.

---

# APPENDIX A

## VIEWGRAPHS FOR LESSON 1: 181-301-0001 version 1

(See Powerpoint Document VGT-0001.PPT)

---

### Learning Step 1

VGT 1, DoD Homosexual Conduct Policy

VGT 2, DoD Homosexual Conduct Policy

### Learning Step 2

VGT 3, Investigating Homosexual Conduct

VGT 4, Investigating Homosexual Conduct

### Learning Step 3

VGT 5, Anti-Harassment Policy

VGT 6, Anti-Harassment Policy

VGT 7, Anti-Harassment Policy

**TEST AND TEST SOLUTIONS**

**FOR LESSON 1: 181-301-0001 version 1**

---

See MS Word Documents TST-0001.DOC and TAN-0001.DOC

# Appendix C

## Practical Exercises and Solutions

N/A

## **APPENDIX D**

### **HANDOUTS FOR LESSON 1: 181-301-0001 version 1**

---

Learning Step 1

Handout, Homosexual Conduct Policy

See MS Word Document HO-0001.DOC

# **Homosexual Conduct Policy**

**Student Handout to Accompany  
TSP 181-A-0001**



***The Judge Advocate General's School  
United States Army  
Charlottesville, Virginia***

***6 March 2000***

# Homosexual Conduct Policy

## 1. INTRODUCTION.

This lesson will reacquaint you with, or inform you of, the DoD policy on homosexual conduct policy. Specifically, you will learn about the policy's provisions regarding what constitutes homosexual conduct. Further, you will also learn about your rights, the rights of your soldiers, as well as the command's responsibilities, during the conduct of an inquiry into allegations of homosexual conduct. Finally, you will be provided guidance of which you, your soldiers, and the command should be aware should any soldier feel harassed or threatened because of a perceived sexual orientation.

Terminal Learning Objective: At the conclusion of this lesson you will:

<i>Action:</i>	Identify the legal implications of the homosexual conduct policy
<i>Conditions:</i>	Given information on the Army's guidance regarding the DoD policy on homosexual conduct.
<i>Standards:</i>	Define what constitutes homosexual conduct. Further, identify the responsibilities of a commander when inquiring into an allegation of homosexual conduct, including the rights of the soldier under inquiry. Finally, identify the rights of a soldier who is being harassed or threatened based on a perceived sexual orientation. Included in this last standard is the ability to identify the commander's responsibilities toward a harassed or threatened soldier, as well as the commander's duty to properly investigate the soldier(s) who are alleged to have committed the harassment and/or threat.

For soldiers who have been in the Army since 1994, it is important to realize that the DoD policy on homosexual conduct has not changed since then. Under this policy, soldiers still have certain rights, and commanders still have certain responsibilities when investigating allegations of homosexual conduct. Based on recent Army guidance, this lesson plan also focuses on the rights of soldiers, and the responsibilities of the command, when faced with a soldier being harassed or threatened because of a perceived sexual orientation.

## 2. KEY ELEMENTS OF THE HOMOSEXUAL CONDUCT POLICY.

**NOTE:** See Figure 1, DoD Homosexual Conduct Policy.

a. Conduct. The key to understanding the DoD policy on homosexual conduct is to remember that it focuses on homosexual conduct (what a soldier does or says) not on sexual orientation alone (how a soldier feels about himself or herself as a heterosexual

("straight") or homosexual ("gay" or "lesbian") or bisexual (sexually attracted to both genders)).

b. "SAM". The easiest way to remember the key features of the DoD policy on homosexual conduct is to remember the acronym "SAM." "SAM" stands for:

Statements – Acts – Marriages.

(1) Statements. The command will take action to separate a soldier who says he or she is gay, or a lesbian, or has a homosexual orientation, because the law says it is reasonable to presume that someone who says he or she has such an orientation will act on that orientation. There is, however, a special rule about statements that we'll discuss later.

(2) Acts. The command will take action to separate a soldier who performs a homosexual act.

(a) A homosexual act is any bodily contact, actively taken or passively permitted, between members of the same sex, for the purpose of satisfying sexual desire. It does not require any particular form of intercourse or penetration.

(b) A homosexual act also includes any bodily contact that a reasonable person would understand to demonstrate a likelihood that the person will engage in homosexual acts. Depending on the circumstances, this could include handholding, kissing, or "slow" dancing with a member of the same sex.

(3) Marriages. The command will take action to separate a soldier who marries or attempts to marry a person of the same biological gender (a male soldier who marries or tries to marry another man, or a female soldier who marries or tries to marry another woman).

(4) Special Rule about Statements. As previously stated, a soldier who says that he or she is homosexual (e.g., "I'm gay," or "I'm a lesbian," or "I have a homosexual orientation," or similar such language) will be processed for separation. Why? Because it is reasonable to presume that someone who says that he or she has such an orientation will act on the orientation and engage in a homosexual act. However, such a soldier may attempt to convince an administrative separation board that despite having made a statement that he or she is homosexual, the soldier will not engage in homosexual acts. If the soldier can convince the separation board that he or she will not engage in homosexual acts, the board can choose to recommend the soldier be retained in the Army.

c. It is your duty, as well as your legal obligation, to follow the Army's rules and policies. You demonstrate your loyalty to the Army and your fellow soldiers by behaving in accordance with Army policies. You also serve honorably when you adhere to the Army's regulations, policies, and laws.

**NOTE:** See Figure 2, DoD Homosexual Conduct Policy.

d. If you, as a soldier, take any of the following actions, you have violated the homosexual conduct policy and may be discharged:

(1) Make a homosexual statement (for example, "I am gay," "I am a lesbian," "I am homosexual," or "I have a homosexual orientation").

(2) Engage in a homosexual act.

(3) Enter, or attempt to enter, into a homosexual marriage.

e. A special point: Saying that you are a homosexual or committing other homosexual conduct so you can avoid a military obligation not only violates Army policy, it betrays your military duty. If you make such a statement or commit such conduct to avoid a military obligation (such as a deployment), you may also be subject to disciplinary action under the UCMJ.

### 3. HOMOSEXUAL CONDUCT INQUIRIES.

**NOTE:** See Figure 3, Investigating Homosexual Conduct.

Before discussing the topic of investigating homosexual conduct, you first need to have a clear understanding of the DoD policy on homosexual conduct. Remember that the policy is conduct-based: it focuses on what a soldier does or says, not on the soldier's orientation alone.

a. Only commanders can initiate fact-finding inquiries into homosexual conduct. You may not, on your own, do any investigation or inquiry into whether a soldier is homosexual or has committed homosexual conduct. Subordinate leaders should direct questions and report grounds for separation to their commanders.

b. Commanders inquire about possible homosexual conduct only if there is credible evidence of a homosexual statement, act, or marriage (remember "SAM"). What is credible evidence? Credible evidence is any information, considering its source and the surrounding circumstances, which supports a reasonable belief that there is a basis for discharge.

c. Commanders are not supposed to investigate (or take other action) when there is **NO** credible evidence of a basis for discharge. Examples of NO credible evidence include:

(1) Mere suspicion of homosexual conduct, without any credible evidence.

(2) Other people's opinions or rumors about a soldier's homosexual orientation, when the opinion or rumor is not based on factual evidence of a basis for discharge.

(3) The fact that a soldier reads a homosexual publication or goes to a homosexual bar.

(4) Statements made by a soldier claiming homosexuality when the evidence available at the time of the statement supports an attempt to avoid duty, or to void an enlistment. Commanders should exercise care before determining that such statements do not meet the requirements of "SAM" as outlined in the DoD Homosexual Conduct Policy guidelines.

d. Informal inquiries are preferred. CID or MPI usually should not become involved in an investigation to determine whether homosexual conduct took place.

e. When interviewing a soldier believed to have committed homosexual conduct, explain the homosexual conduct policy to the soldier before questioning. The interviewer will begin the interview by informing the soldier of his or her rights against self-incrimination under Article 31, UCMJ. If the soldier does not want to make a statement, the interviewer will not ask further questions.

(1) An interviewer shall not ask, and a soldier shall not be required to reveal, whether a soldier is heterosexual, homosexual, or bisexual. For example, you cannot ask either, "Are you homosexual?" or "Are you gay?"

(2) If the inquiry is only about a statement (e.g., "I am gay") the soldier has made, in most cases, the admission by the soldier is sufficient and no further investigation is required. If a commander wishes to inquire further to determine whether the statement is credible, the commander may do the following:

(a) If the soldier is to be interviewed about the statement, he or she must first be read his or her rights against self-incrimination under Article 31, UCMJ.

(b) The soldier can then be asked if he or she has committed, or attempted to commit, homosexual acts. The soldier may be asked if he or she intends to commit homosexual acts in the future. The soldier may be asked why he or she made the statement and what the statement meant.

(c) Members of the soldier's supervisory chain-of-command may be questioned. Other persons suggested by the soldier in the interview may also be questioned.

**NOTE:** See Figure 4, Investigating Homosexual Conduct.

(d) Any inquiry beyond that stated in paragraphs (a), (b) and (c) above is considered a "substantial investigation" requiring approval from DA level.

i. Statements made by a soldier to certain individuals (e.g., chaplains, attorneys, and spouses) may be considered confidential. However, such statements must be looked at separately on a "case by case" basis to determine whether or not the statements are confidential.

j. It is your duty, as well as your legal obligation, to follow the Army's rules and policies. You demonstrate your loyalty to the Army and your fellow soldiers by behaving in accordance with Army policies. You also serve honorably when you adhere to the Army's regulations, policies, and laws.

k. If you, as a soldier, take any of the following actions, you have violated the homosexual conduct policy:

(1) Investigate a soldier for homosexual conduct without a commander's permission.

(2) Accuse a soldier of violating the homosexual conduct policy based on:

- Suspicion without credible evidence;
- Rumors;
- Observing a soldier with homosexual materials or in certain locations (e.g., gay bars).

#### 4. GUIDANCE REGARDING SOLDIERS BEING HARASSED OR THREATENED BECAUSE OF A PERCEIVED SEXUAL ORIENTATION.

**NOTE:** See Figure 5, Anti-Harassment Policy.

A soldier who is being threatened or harassed because he or she is perceived to be homosexual should always seek out his or her chain-of-command to get help. Alternatively, the soldier should go to the chaplain, IG, or a JAG legal assistance attorney.

a. Harassed soldiers are not investigated. If a soldier is being harassed or threatened because the soldier is said or perceived to be homosexual, the harassment or threat is not enough by itself to justify investigating the harassed/threatened soldier for homosexual conduct. This bar to investigation concerning the harassed soldier's sexual orientation does not prevent investigation of the soldier(s) committing the harassment for possible violations of the UCMJ.

**NOTE:** See Figure 6, Anti-Harassment Policy.

b. There must be credible information apart from harassment. A commander still needs credible information apart from any threat or harassment to justify an inquiry into homosexual conduct.

c. When investigating harassment, a harassed soldier's orientation/conduct should not be investigated. When investigating a threat or harassment, the threatened/harassed soldier's sexual orientation should not be investigated, nor whether he or she committed homosexual conduct. The focus should be on the harassment or threat itself.

d. If credible information comes up during the investigation, it must be carefully reviewed. The information must be credible, apart from the harassment or threat. Receiving this information does not stop the requirement to investigate and take appropriate action against any harasser.

**NOTE:** See Figure 7, Anti-Harassment Policy.

e. Soldiers being harassed/threatened should seek out their chain-of-command. Soldiers who are being harassed or threatened because they are perceived to be homosexual should seek their chain-of-command for assistance. They should understand that reporting harassment or threats does not support an investigation into whether they have committed homosexual conduct. The command cannot make harassment stop if it is not reported. Commanders must adequately address reported instances of harassment, to include initiating a commander's inquiries under R.C.M. 303, or referring the case to MPI or CID for investigation of the individuals committing the harassment. Soldiers who are being harassed must know that they will not be investigated regarding their sexual orientation as a result of telling the chain-of-command about the harassment.

## 5. SUMMARY.

a. During this lesson, you learned that the DoD and Army policy on homosexual conduct focused on homosexual conduct and not on sexual orientation. You were advised that the policy covered homosexual conduct, which includes statements, act, and marriages, and that soldiers could be separated from the Army for such conduct. However, you should remember that there is a special rule about homosexual statements. This means that even if a soldier makes a statement that he or she is homosexual, the soldier may still be retained in the U.S. Army if the soldier can convince a separation board that he or she will not actually engage in homosexual acts.

b. The lesson also advised you that only commanders can initiate fact-finding inquiries into homosexual conduct. CID or MPI investigators usually should not become involved in an investigation to determine whether homosexual conduct took place. Commanders may inquire into possible homosexual conduct only if there is credible evidence, meaning more than mere suspicion or rumor, of a homosexual statement, act,

or marriage. A commander must explain the homosexual conduct policy to any soldier alleged to have been involved in homosexual conduct before inquiring further. The interviewer, before asking any questions, must first inform the soldier of his or her rights against self-incrimination under Article 31, UCMJ. A "substantial investigation" requires approval from Department of the Army level (see Learning Step/Activity 2, Paragraph g).

c. Finally, the lesson advised soldiers, who feel threatened or harassed because of perceived homosexual orientation, to seek assistance from their chain-of-command, chaplain, IG, or JAG legal assistance attorney. When investigating a threat or harassment, the focus should be on the threat or harassment and not on the perceived sexual orientation or alleged homosexual conduct of the threatened/harassed soldier. If the commander has credible information regarding any homosexual conduct apart from the threat or harassment, the commander could then initiate an inquiry into these allegations.



## DoD Homosexual Conduct Policy



- Focus of the policy is Homosexual Conduct, NOT Sexual Orientation
- Command will separate soldiers for homosexual:
  - Statements (e.g. “I am gay”);
  - Acts; or,
  - Marriages (actual or attempted)
- Note: A soldier who makes a homosexual statement, but who also convinces a separation board that he or she will not engage in homosexual acts, can be retained in the Army

1

Figure 1



## DoD Homosexual Conduct Policy



- A soldier who takes any of the following actions violates the homosexual conduct policy and may be discharged from the Army
  - Makes a homosexual statement
  - Commits a homosexual act
  - Enters, or attempts to enter, into a homosexual marriage
- A soldier who, for the purpose of avoiding military duty, engages in any of the behaviors listed above may be subject to disciplinary action under the UCMJ

2

Figure 2



## Investigating Homosexual Conduct



- *Only* Commanders Initiate Inquiries
- An inquiry must be based on Credible Information
- Examples of information that is NOT Credible:
  - Mere suspicion, opinion or rumors
  - Reading Homosexual Publications/Going to “gay bars”
  - Homosexual statements made to avoid duty
- Conduct the inquiry (informal inquiries preferred):
  - Right against self-incrimination (Article 31, UCMJ)
  - Cannot ask soldier about his/her sexual orientation
  - Can question soldier’s supervisory chain-of-command
  - Can question persons suggested by the soldier

3

Figure 3



## Investigating Homosexual Conduct



- “Substantial investigation” requires DA approval
- Statements to chaplains, attorneys and spouses may be considered confidential
- You will violate the Policy IF:
  - You investigate a soldier for homosexual conduct without a commander’s permission; or,
  - Accuse a soldier of violating the homosexual conduct policy based on:
    - Suspicion without credible evidence
    - Rumors
    - Observing a soldier with homosexual materials or in certain locations (e.g. “gay bars”)

4

Figure 4



## Anti-Harassment Policy



- A soldier being harassed should seek out the chain-of-command, a chaplain, the IG, or a legal assistance attorney
- A harassed or threatened soldier should not be investigated simply because of the harassment or threat
- The DoD Homosexual Conduct Policy does not, however, prohibit investigating a soldier(s) who harasses or threatens another soldier for possible violations of the UCMJ

5

Figure 5



## Anti-Harassment Policy



- Commanders need credible information other than harassment to investigate a soldier for homosexual conduct. **HARASSMENT ALONE IS NOT CREDIBLE INFORMATION.**
- Absent credible information, an investigation into a complaint of either harassment or of a threat must focus on the harassment or threat, **ONLY**
- Credible information discovered during the course of an investigation does **NOT** stop the requirement to properly dispose of allegations of harassment

6

Figure 6



## Anti-Harassment Policy



- The command cannot make harassment stop if it is not reported
- Commanders must adequately address reported instances of harassment
  - The focus of any investigation into alleged harassment must be on the soldier(s) committing the harassment
  - Harassed or threatened soldiers must know that their own sexual orientation will not be the subject of the investigation
  - When conducting the investigation, a commander can request the assistance of either MPI or CID

7

Figure 7